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NO. 81-148

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,
Respondent,

v.

BILL M. MARTIN,
Petitioner.

On a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

Brief of Petitioner

B. Hayden Crawford
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in not reversing the trial court's refusal to allow petitioner's post-verdict request to question the trial jury foreman and/or the other about public statements made by the jury foreman representing his hostile attitude and that of the other jurors toward the trial judge with the resultant prejudice against the defendant, when the jury foreman made several post-verdict statements to the news media reflecting a very hostile and vindictive attitude toward the trial judge because of his dismissal of various counts of the Indictment against the defendant.

2. Whether the Court of Appeals erred in not reversing the trial court's refusal to grant a new trial where the evidence pertaining to eleven counts of an Indictment which were subsequently dismissed was presented to the jury and commingled into the evidence on the one count not dismissed, thus creating highly prejudicial confusion in the minds of the jurors to the detriment of the defendant.

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TENTH CIRCUIT COURT OF APPEALS OPINION

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported but it is reprinted as Appendix A to this petition.

GROUNDS FOR JURISDICTION

The date of the judgment rendered by the United States Court of Appeals for the Tenth Circuit was January 8, 1981. A petition for rehearing was denied on June 10, 1981. The statutory provision of the United States Code which allows this appeal is 28 U.S.C. §1254(1).

STATUTES

The petitioner appeals from a guilty verdict on one count of an Indictment which is based upon 18 U.S.C. §1014 and §2.

STATEMENT OF THE CASE

Proceedings in the Trial Court

On October 5, 1978, the petitioner was charged in a twelve count Indictment by a Grand Jury convened in the United States District Court for the Northern District of Oklahoma. The petitioner entered pleas of not guilty to the twelve counts on October 12, 1978. Due to drafting errors by the Government in the first Indictment, the petitioner was reindicted on November 8, 1978. On November 28, 1978, the petitioner entered pleas of not guilty to the twelve counts of the second Indictment. At that time, the first Indictment was dismissed.

On January 9, 1979, a jury was empaneled to consider evidence against the petitioner in the twelve count Indictment. The counts of the Indictment were based upon 18 U.S.C. §656, §1014, and §2.

At the close of the Government's case in chief, the trial court, after hearing arguments of counsel outside the presence of the jury, entered orders of acquittal on Counts 1, 3, 4, 5, 8, 9, 10 and 12 of the Indictment. Thereafter, at the close of petitioner's evidence, and after hearing arguments of counsel outside of the presence of the jury, the trial court sustained the petitioner's renewed motion for judgment of acquittal with regard to Counts 6 and 11.

On February 6, 1979, the jury returned a guilty verdict on Counts 2 and 7. Petitioner's counsel reviewed and reargued his motions for judgment of acquittal with regard to Counts 2 and 7 on February 6, 1979. The trial court then entered a judgment of acquittal not withstanding the verdict on Count 7 of the Indictment and took the motion under advisement with regard to Count 2.

On February 26, 1979, the trial court suffered a relapse of an illness which he had suffered during the course of the trial and died prior to the ruling on petitioner's remaining motion for judgment for acquittal. The case was then reassigned to another District Judge and on August 1, 1979, the successor District Judge entered an order overruling the petitioner's motion for judgment acquittal on Count 2 of the Indictment.

On August 31, 1979, petitioner's motion for new trial on Count 2 was overruled. The petitioner was sentenced to serve fourteen months in the custody of the Attorney General of the United States and fined $2,000.00 on Count 2 of the Indictment. The execution of this sentence was stayed by the District Court pending appeal.

Proceedings in the Court of Appeals

The petitioner timely appealed the judgment of the trial court to the United States Court of Appeals for the Tenth Circuit. On January 8, 1981, the Court of Appeals affirmed the trial court in an unpublished opinion (Appendix A).

The petitioner timely filed for a rehearing before the Court of Appeals. On June 10, 1981, the Court of Appeals denied the petitioner's request for rehearing.

The execution of petitioner's sentence has been stayed by the United States Court of Appeals for the Tenth Circuit pending notification of the receipt of this petition by this Honorable Court.

REASONS FOR GRANTING THE WRIT

Questioning of Jurors

It is respectfully and urgently requested that this Honorable Court clarify and define specific guidelines with regard to when a counsel for a defendant may approach and question a juror after a verdict has been returned when there are strong indications that improper and prejudicial considerations may have entered into the jury's verdict. On two occasions, the petitioner filed motions for judgment of acquittal based upon newspaper articles citing statements of the jury foreman expressing displeasure with the trial court's handling of the case. (See Appendices E and F). The jury foreman's statements included such quotations as:

> "I have never seen a more biased proceeding."
>
> "A lot of country judges used to look at labor as a Loch Ness monster and they'd give all sorts of weight to the other side. And yet, when I look back on them, they always gave a much more unbiased proceeding than Judge Barrow did."
>
> "I don't believe I want to serve in that courtroom again . . . my animosity might cause me to be prejudiced."
>
> "I have serious doubts whether I could reach an honest decision in that Court."

The articles further read that the foreman had contacted other jurors and "they also are angry" and that the jury found that it was "extremely difficult for us to understand what happened".

Counsel for petitioner then requested that he be allowed to question the jurors as to the statements made by the foreman. The successor trial judge stated that:

> " — Under the Rules no contact can be made

with the jurors without prior permission and authority of the Court. It is the Court's feeling that this should be denied. I have a pretty strong feeling that absent special and compelling circumstances jurors should not be called upon to search their own reactions to determine why they came to a conclusion in the confines of their deliberation room. There is sanctity in that room. There is sanctity in the deliberative process that a jury goes through and we should not invade that sanctity. I am having increasing requests for permission to visit with the jurors, some say for the purpose of determining how the attorney did, how the presentation went, to better their trial skills. There are other ways to do that and I strongly believe that jurors should not be called upon — sometimes their determinations are not based upon articulated thinking and when called to do it it, I think, invades the jury process.

So, your request to visit with the jurors will be denied. — " (Transcript of August 24 and 31, 1979 Proceedings, pages 21-22).

Rule 33 of the Rules of the District Court for the Northern District of Oklahoma requires Court approval before approaching a juror after the completion of the case. However, Disciplinary Rule 7-108 of the American Bar Association Canons of Professional Responsibility does not prohibit the contacting of a juror except to avoid harassment or embarrassment. Guidance is requested from this Honorable Court with regard to when a juror may be contacted. A problem of equal protection arises between the application of the same rule in different districts of Oklahoma. The attitude of the District Court for the Northern District of Oklahoma is clear by the statements of the District Court in this case. However, while the same rule is in effect for the Western District of Oklahoma the application of the rule there is

considerably different. For example, a request was made to the District Court to visit with the jurors in a 1979 case in the Western District of Oklahoma. (See Appendix H). The stated purpose of the request was to ". . . discern which trial tactics or maneuvers were particularly impressive to the jurors and which were particularly unimpressive." The District Court in the Western District granted that request. (See Appendix I).

The request granted in the Western District of Oklahoma was for a purpose which the trial court in petitioner's case said was improper.

We therefore have, in effect, in two Oklahoma districts, not a question of "discretion", but rather a difference between two absolutes - in the Western District counsel may apparently always question the jurors and in the Northern District counsel apparently may never question the jurors since there would be no more " special and compelling circumstances" than were presented in this case!

The lack of guidelines in the area of post-trial juror contact provides an area of definite need for this Honorable Court to provide specific parameters to guide counsel and the District Courts in situations where legitimate questions as to the conduct and prejudicial attitute of jurors arises.

In this case, it is crucial for the determination of whether this petitioner received a fair and impartial trial, to know whether the attitude of the jury foreman and the other jurors toward the trial judge tainted their deliberations on the counts which were submitted to them for determination. If the foreman's animosity toward the trial judge caused him, as he publicly stated, to be prejudiced in the future, it surely would have caused him to be prejudiced in this case against the petitioner.

It is respectfully suggested that the interview of jurors under such circumstances, as in this case, could be conducted in the District Court's conference room and under the supervision of personnel of the District Court in

order to prevent any possible abuse of a juror under an order permitting questioning of the juror when there are circumstances warranting such an order as are present in this case.

"Spillover" or "Flooding" of Evidence

In addition to the exigent need for guidelines as to when counsel for a defendant may contact a juror, it is respectfully submitted to this Honorable Court that reasonable definition as to the limits of "spillover" or the "flooding" of evidence from a multiplicity of counts is also urgently needed. In a situation such as in the present case where many counts are involved in an indictment, and during the course of the trial several counts are dismissed by the trial court for various reasons, it becomes more and more difficult for a jury to filter all of the evidence presented on all of the counts to just one or two remaining counts. This Honorable Court, it is respectfully suggested, should focus on this problem and provide a clear set of guidelines which can be applied in the future by the District Courts to criminal cases.

In the present case, ten of the twelve counts against the petitioner were disposed of before the jury began its deliberation on the two remaining counts. However, the impact upon the jury of the evidence presented on the ten counts is clearly prejudicial. *Fotry-five* exhibits were introduced by the Government in support of the ten dismissed counts and *only four* related to the counts that were submitted to the jury. The total evidence submitted to the jury in the almost month long trial was in approximately the same proportions - over 90% of the evidence submitted to the jury pertained to counts that were dismissed! Due to the fact that counsel for the petitioner could in no way anticipate the evidence which would be presented by the Government during the course of the trial, a motion to sever or a challenge to joinder under Rule 14 of the Federal Rules of Criminal Procedure was, for all practical purposes inapplicable. *United*

States v. Mandel, 415 F.Supp. 1033 (D.Md. 1976).

The Court of Appeals in its opinion in petitioner's case, stated that: "There is no reason advanced why the jury could not relate the proof to the courts." However, this conclusion is clearly erroneous as evidenced by the trial court's judgment of acquittal notwithstanding the verdict on Count 7 of the Indictment and the statements of the prosecutor in his closing argument.

Furthermore, the statements by the prosecutor in his closing argument vividly illustrate the "flooding" problem. Those remarks should have been limited to the two counts then before the jury pertaining to the alleged submission to one bank of one document. The continued reference by the prosecutor to the evidence presented on all twelve of the counts must certainly have created confusion in the minds of the jury. For example, this conclusion is reflected by these types of statements by the prosecutor dealing with the totality of the evidence:

> "... relating to new facts ... so that you would get a total picture as to what took place over a two-year period this indictment covered ..." (TR 887).
>
> "How much did he really get from all of these investors" (TR 931).
>
> "I have yet to hear one witness say Mr. Martin did not commit these criminal acts as charged in the case." (TR 928).
>
> "When financial empire crumbles ... had a ball club, owned the Tulsalite Magazine, controlling interest in three banks." (TR 889).
>
> "... he became involved with three banks and had plans to buy more." (TR 928).
>
> "... assigning over all his assets except his house and his car? ... Why did he sign it? ... he admitted that he had done wrong." (TR 928).

It is obvious that even the Government attorney was

having much difficulty in separating the evidence of the ten dismissed counts from the evidence on the two counts remaining before the jury.

If the Government attorney could not separate the evidence of the ten dismissed from the two remaining counts, how then can one expect the jurors to disregard the evidence of the ten dismissed counts from the then two remaining counts! This is reinforced by the fact that there *was no evidence* to support Count 7, since the single submission of the same document was alleged to support both Counts 2 and 7 and Count 7 was alleged to have taken place a year later! It was for this reason the trial court had to subsequently dismiss Count 7.

The "flooding" of evidence from dismissed counts must at some point contaminate counts that are presented to a jury for its deliberation. When the "flooding" becomes prejudicial, a defendant cannot be rendered a fair and impartial jury trial. In the present case, the "flooding" was devastating in that the jury could in no way separate the evidence on Counts 2 and 7 from the counts which were not before the jury for consideration, regardless of the court's instructions. The subsequent dismissal of Count 7 by the trial court reinforces the conclusion that the "flooding" problem must be defined and guarded against. It a defendant is to be convicted, he must be convicted upon the evidence of the particular charges and not from extrinsic and prejudicial evidence presented on other dismissed counts which have no relation to the submission to the jury. *United States v. Foutz*, 540 F.2d 133 (4th Cir. 1976).

The treatment and the defining of guidelines by this Honorable Court of the "spillover" of "flooding" effect of evidence presented to a jury on counts of an indictment which are subsequently dismissed, regardless of instructions to the jury endeavoring to disregard the "spillover" or "flooding" effect will define and guide both counsel and the trial courts in the proper presentation of evidence to a jury.

CONCLUSION

These two issues presented to this Honorable Court in this Petition for Writ of Certiorari are unique and illustrate areas of serious difficulty which are urgently in need of guidance by this Honorable Court and, based upon the facts of this case, such guidance will clearly benefit the judicial justice system of the United States.

Respectfully submitted,

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Apendix of Petition

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APPENDIX A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 79-2000

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	On Appeal From The United States District Court For The Northern District Of Oklahoma (D.C. No. 78-CR-119-C)
v.	)	
BILL M. MARTIN,	)	
Defendant-Appellant.	)	

B. Hayden Crawford, of Crawford and Jackson (Richard A. Hoffman, of Morrel, Herrold, West, Hodgson, Shelton & Striplin, P.A., with him on the brief), Tulsa, Oklahoma, for Appellant.

Hubert H. Bryant, United States Attorney (Robert P. Santee, Assistant United States Attorney, with him on the brief), Tulsa, Oklahoma, for Appellee.

Before SETH, Chief Judge, BARRETT and SEYMOUR, Circuit Judges.

PER CURIAM.

The defendant was indicted in a twelve-count indictment for misapplication of bank funds and false statements in loan applications. At the end of the Government's case eight counts were dismissed and at the close of all evidence the court granted a motion for acquittal on two more counts.

Two counts went to the jury and a verdict of guilty was returned on both counts. The trial court entered a judgment of acquittal NOV on one of the two counts. This left only the conviction on Count II for false statements on a particular loan application.

The defendant moved for a new trial which was denied, and the defendant was sentenced. On this appeal the defendant urges that he was denied a fair trial by reason of the evidence which was presented on the counts which were dismissed. No relief on this ground was sought in the trial court and no challenge was made to the joinder under Rule 14 of the Federal Rules of Criminal Procedure. It was obvious that proof would be offered on each count. If defendant was concerned about the overall impact of the proof, a remedy was available to him under the rules.

It was thus reasonable and not unfair for the Government to introduce evidence on all counts of the indictment as the trial proceeded. Separate transactions were alleged, and in the absence of any challenge to the joinder the Government could proceed with the proof in the usual way. There is no assertion that the dismissal of the ten counts could be anticipated. The jury heard the proof and there is no reason advanced why the jury could not relate the proof to the counts.

What took place here occurs whenever a count is dismissed to a greater or lesser extent. The number of counts dismissed was large compared to the total but was not so great as to result in an unfair trial. The defendant in his brief asserts that the everal counts referred to unconnected events. The events did occur over a period of

time and related to defendant's activities and postion at the bank. They were uncomplicated and there is again no reason to believe that the jury was unable to distinguish between the incidents as directed by the trial judge. The cautionary instructions were adequate to bring the problem to the attention of the jury. We have considered Robinson v. United States, 459 F.2d 847 (D.C. Cir.), cited by appellant and find nothing therein to be contrary to the result here reached. *Robinson* is a thorough discussion of severance considerations.

The appellant refers to delays in the trial caused by the illness of the trial judge. We find no merit to these contentions. The matter was unfortunate but the problems were met by adequate admonitions and instructions.

The defendant urges that he should have been permitted under the post-trail proceedings to examine one of the jurors as to statements asserted to have been made by the juror to a newspaper. We have considered the statements which were supposed to have been made and find no reason to hold that the trial court was in error in its refusal to permit the examination of the juror. This is a matter within the discretion of the trial judge. The defendant did not advance this argument as a basis for a new trial. The new trial motion makes no mention of this matter. It is certainly not a matter on which to base a judgment of acquittal as defendant urges. In short, the newspaper item did not support any claim for relief. *See* Fed. R. Evid. 606(b).

We have also examined the closing remarks of the prosecutor and find no basis for defendant's assertion that they were improper or caused the trail to be unfair. The prosecutor in argument did refer to some of the events which had been described in the proof on counts which had been dismissed. These references were of minor points and there is no reason to believe that they were not

inadvertent. There is nothing approaching clear error, and the record does not show that defendant made any objection to the closing arguments by the Government.

AFFIRMED.

APPENDIX B

United States Court of Appeals
Tenth Circuit
Office of the Clerk
469 United States Courthouse
Denver, Colorado 80202

January 21, 1981

Mr. Jack C. Silver, Clerk
United States District Court
411 U. S. Courthouse
Tulsa, OK 74103

Re: No. 79-2000, U.S.A. v. Bill M. Martin
(D. C. No. 78-00119)

Dear Mr. Silver:

Pursuant to Rule 41 of the Federal Rules of Appellate Procedure, effective July 1, 1968, as amended, I am enclosing a certified copy of the judgment, and a copy of the opinion, which shall constitute the mandate of this Court. You will please file this mandate in the records of your court immediately upon receipt of it by direction of this Court. I am also enclosing a form of receipt for you to sign and return to this office.

The original record on appeal will be returned to you under separate cover.

Sincerely yours,

HOWARD K. PHILLIPS, Clerk

HKP:rp

Enclosures

cc: B. Hayden Crawford, Crawford & Johnson, 1714 First Nat'l. Bank, Tulsa, OK 74103
Richard A. Hoffman, Morrel, Herrold, West, Hodgson, Shelton & Striplin, P. A., 411 South Darlington, Suite 600, Tulsa, OK 74135
Hubert H. Bryant, US Attorney, Robert P. Santee and Eleanor Darden Thompson, Assistants, 460 US Courthouse, Tulsa, OK 74103

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 79-2000

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	On Appeal From The United States District Court For The Northern District Of Oklahoma (D.C. No. 78-CR-119-C)
v.	)	
BILL M. MARTIN,	)	
Defendant-Appellant.	)	

B. Hayden Crawford, of Crawford and Jackson (Richard A. Hoffman, of Morrel, Herrold, West, Hodgson, Shelton & Striplin, P.A., with him on the brief), Tulsa, Oklahoma, for Appellant.

Hubert H. Bryant, United States Attorney (Robert P. Santee, Assistant United States Attorney, with him on the brief), Tulsa, Oklahoma, for Appellee.

Before SETH, Chief Judge, BARRETT and SEYMOUR, Circuit Judges.

PER CURIAM.

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Two counts went to the jury and a verdict of guilty was returned on both counts. The trial court entered a judgment of acquittal NOV on one of the two counts. This left only the conviction on Count II for false statements on a particular loan application.

The defendant moved for a new trial which was denied, and the defendant was sentenced. On this appeal the defendant urges that he was denied a fair trial by reason of the evidence which was presented on the counts which were dismissed. No relief on this ground was sought in the trial court and no challenge was made to the joinder under Rule 14 of the Federal Rules of Criminal Procedure. It was obvious that proof would be offered on each count. If defendant was concerned about the overall impact of the proof, a remedy was available to him under the rules.

It was thus reasonable and not unfair for the Government to introduce evidence on all counts of the indictment as the trial proceeded. Separate transactions were alleged, and in the absence of any challenge to the joinder the Government could proceed with the proof in the usual way. There is no assertion that the dismissal of the ten counts could be anticipated. The jury heard the proof and there is no reason advanced why the jury could not relate the proof to the counts.

What took place here occurs whenever a count is dismissed to a greater or lesser extent. The number of counts dismissed was large compared to the total but was not so great as to result in an unfair trial. The defendant in his brief asserts that the several counts referred to unconnected events. The events did occur over a period of

time and related to defendant's activities and position at the bank. They were uncomplicated and there is again no reason to believe that the jury was unable to distinguish between the incidents as directed by the trial judge. The cautionary instructions were adequate to bring the problem to the attention of the jury. We have considered Robinson v. United States, 459 F.2d 847 (D.C. Cir.), cited by appellant and find nothing therein to be contrary to the result here reached. *Robinson* is a thorough discussion of severance considerations.

The appellant refers to delays in the trial caused by the illness of the trial judge. We find no merit to these contentions. The matter was unfortunate but the problems were met by adequate admonitions and instructions.

The defendant urges that he should have been permitted under the post-trial proceedings to examine one of the jurors as to statements asserted to have been made by the juror to a newspaper. We have considered the statements which were supposed to have been made and find no reason to hold that the trial court was in error in its refusal to permit the examination of the juror. This is a matter within the discretion of the trial judge. The defendant did not advance this argument as a basis for a new trial. The new trial motion makes no mention of this matter. It is certainly not a matter on which to base a judgment of acquittal as defendant urges. In short, the newspaper item did not support any claim for relief. *See* Fed. R. Evid. 606(b).

We have also examined the closing remarks of the prosecutor and find no basis for defendant's assertion that they were improper or caused the trial to be unfair. The prosecutor in argument did refer to some of the events which had been described in the proof on counts which had been dismissed. These references were of minor points and there is no reason to believe that they were not

inadvertent. There is nothing approaching clear error, and the record does not show that defendant made any objection to the closing arguments by the Government.

AFFIRMED.

APPENDIX C

MAY TERM - June 10, 1981

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	
BILL M. MARTIN,	)	No. 79-2000
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By Robert L. Hoecker
Chief Deputy Clerk

APPENDIX D

MAY TERM - June 26, 1981

Before Honorable Oliver Seth, Honorable James E. Barrett and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	
BILL M. MARTIN,	)	No. 79-2000
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's motion for stay of mandate which the Court is treating as a motion to recall and stay the mandate cause.

Upon consideration whereof, it is ordered that the mandate of this Court issued June 15, 1981, is recalled.

It is further ordered that the mandate shall be stayed until July 26, 1981, pending certiorari, and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	
BILL M. MARTIN,	)	No. 78-CR-119-B
Defendant-Appellant.	)	

SECOND RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL

COMES NOW the defendant, Bill M. Martin, through his attorneys, and respectfully states:

I.

On February 6, 1979, immediately after the return by the jury of the verdict of guilty to Counts II and VII of the Indictment, the defendant renewed his Motion for Judgment of Acquittal with regard to Count VII of the Indictment upon the grounds sent forth below, among others:

> Counts II and VII were both based upon a single alleged act by the defendant, to-wit: alleged representations to one Michael C. Bingham who prepared a financial statement for one George Johnson, dated November 1, 1975, which financial statement was introduced into evidence as the Government's Exhibit 52.
>
> The Government contended that this financial statement was the basis for Count II in support of the allegation that "On or about the 12th day of December, 1975 . . . Bill M. Martin willfully did

cause a materially false statement to be made in documents for a loan submitted by George Johnson . . . for the purpose of influencing the action of said bank to approve said loan . . ."

Count VII alleged that "On or about the 29th day of November, 1976," almost a year later, "Bill M. Martin willfully did cause a materially false statement to be made in documents for a second loan submitted by George Johnson . . ."

The attorney for the defendant, in his closing argument, pointed out to the jury that there was no second document in evidence supporting Count VII and that the jury had no alternative but to return a verdict of not guilty on Count VII, and charged the Government attorney to produce such a document, if it existed, from the exhibits.

The Government attorney, in his closing argument, admitted that both Counts II and VII were based upon the single document introduced as the Government's Exhibit 52 and then stated to the jury, in effect, "Don't let Mr. Crawford confuse you about that."

There is no question but that Counts II and VII alleged two identical offenses based upon a single alleged act and, consequently, contrary to the Fifth Amendment to the Constitution of our United States with regard to double jeopardy.

The Court properly ruled and sustained the defendant's Motion for Judgment of Acquittal with regard to Count VII.

II

On February 6, 1979, immediately after the return by the jury of the verdict of guilty to Counts II and VII of the Indictment, the defendant renewed his Motion for Judgment of Acquittal with regard to Count II of the

Indictment upon the grounds set forth below, among others:

> The testimony did not establish that Bill M. Martin gave information to Michael C. Bingham on or about December 12, 1975, which "Bill M. Martin then and well knew the same to have been false" and "for the purpose of influencing the action of said bank to approve said loan."
>
> The evidence was overwhelming that at the time of the alleged offense, Bill M. Martin lacked the substantial capacity to understand and wrongfulness or illegality of his acts, was incapable of controlling his conduct due to the serious nature of his illness, and that his illness impaired his capacity to understand the consequences of his actions.

The arguments supporting these grounds were articulated to the Court by the attorney for the defendant and the Court advised that the Motion for Judgment of Acquittal with regard to Count II would be taken under advisement pending further review of the testimony by the Court.

III.

On February 14, 1979, there appeared at the top of the front first page in the Tulsa, Oklahoma afternoon newspaper, an article headlined "Juror Rips Barrow's Verdict Dismissal," in which the jury foreman, one Arthur Berkey, is quoted as stating that his "faith in the judicial system is shaken," that "I have never seen a more biased proceeding," that "It is extremely difficult for us to understand what happened," and that "Now, I ask, 'how secure is the right of trial by jury . . . if the judge can take a verdict away from a jury?'"

> If these statements are properly quoted, it is apparent that the juror did not base his decision

upon Counts II and VII from the evidence and that the juror did not follow the Court's instructions as he was sworn to do.

Under our judicial system the verdict of a jury is not absolute and can properly be set aside by the Court to prevent an injustice.

IV.

The same newspaper article quotes Arthur Berkey as stating to the newspaper reporter as follows: "Berkey said he and other jurors objected to remarks by Barrow during the trial that 'greed raised its ugly head,' referring to witnesses who used Martin as a financial advisor."

Prior to the introduction of evidence, the jury was instructed by the Court not to read newspaper articles or listen to radio or television broadcasts with regard to the proceedings of the trial, and periodically throughout the trial, the Court reminded the jurors of this admonishment.

The statement by the Court that "greed raised its ugly head" was made to the attorneys outside the presence of the jury and at a time when the jury was recessed from the courtroom.

If it is true that Mr. Berkey and other jurors objected to remarks by the Court during the trial that "greed raised its ugly head," then it is apparent that Mr. Berkey and such other jurors did not follow the Court's admonishment pertaining to reading or listening to reports of the trial proceedings.

V.

Arthur Berkey is further quoted in the newspaper article as stating to the newspaper reporter as follows: "And in discussing Martin's case in the jury room with all the documents, we went beyond a reasonable doubt in

reaching our decision . . . we held he was guilty beyond a shadow of a doubt."

This statement by the juror, if it be true, as well as the entire newspaper article, can only be interpreted as an endeavor by the juror to influence the Court in its pending decision pertaining to the Motion for Judgment of Acquittal on Count II of the Indictment.

Consequently, it is respectfully submitted that such public statements by the juror while the matter is still pending clearly could have been anticipated by the juror to come to the attention of the Court and, therefore, are highly prejudicial to the defendant and contrary to proper judicial procedures.

VI

Arthur Berkey is further quoted in the newspaper article as having stated to the newspaper reporter that "I have never seen a more biased proceeding" and then, "A lot of country judges used to look at labor as the Loch Ness Monster and they'd give all sorts of weight to the other side. And yet, when I look back on them, they always gave a much more unbiased proceeding than Judge Barrow did."

It is aparent, if those statements be true, that the juror is of the opinion that those who do not agree with him are "biased" prejudicial. In defense of the Court, if there should be a need for such defense, there is probably no sitting federal judge who is freer from bias and prejudice than Judge Barrow.

It can be noted from the record that the Court admitted all of the evidence and all of the exhibits that the Government endeavored to introduce, frequently over the vigorous objections of the attorney for the defendant, which objections the attorney for the defendant still contends were

valid, although recognizing that the rulings of the Court were based upon the Court's interpretation of the law and not upon bias or prejudice.

VII.

Arthur Berkey is further quoted in the newspaper article as having stated to the newspaper reporter that he knows something of the law and that "I've had to try cases in the union, hear cases as a judge and hold hearing on union employees. In labor circles, I am what is considered a trial lawyer."

If these statements are true, then the juror was not forthright with the Court during the voir dire or questioning of the jurors.

If it had been known by the attorneys for the defendant that the juror considered himself a "judge" and a "trial lawyer," he certainly would have been challenged by the defense and removed from the jury panel.

Under our judicial system the jurors are to decide the facts and the Court is to decide the law and instruct the jurors with regard to the law; and our system falters when jurors invade the providence of the Court and determine the law without regard to the Court's instructions.

The reasons why judges and trial lawyers are normally not permitted to be jurors is clear from the statements of this juror who considers himself to be a judge and a trial lawyer and then attacks the judicial decisions of the Court and states "I don't believe I want to serve in that courtroom again . . . ", because *his* opinions did not always prevail.

VIII.

It is apparent from the foregoing and the newspaper

article dated February 14, 1979, a copy of which is attached hereto and marked Exhibit "A", that the jurors returned their verdict of guilty to Count II in retaliation of some imagined bias or prejudice on the part of the trial Judge and not upon the evidence and instructions of the Court as required by law.

It is even more apparent that the testimony of Dr. James O'Carroll that the defendant was "out of his mind" and "insane" and the testimony of Dr. Mary F. Hamilton that the defendant's mental illness caused him to have "delusions of grandeur", "complete lack of judgment and reasoning" and "uncontrollable behavior . . . " was ignored, together with Dr. Max Alden Baker's statement of his analysis of the defendant as contained in defendant's Exhibit 10.

WHEREFORE, in the interest of justice and in accordance with the proceedings herein, the defendant, through his attorneys, respectfully enters herein his Second Renewal of his Motion for Judgment of Acquittal on the second count of the Indictment.

Respectfully submitted,

MORREL, HERROLD, WEST, HODGSON, & STRIPLIN, P.A.

and

CRAWFORD & JACKSON

By B. HAYDEN CRAWFORD
1714 First National Building
Tulsa, Oklahoma 74103

Attorneys for Defendant

CERTIFICATE OF SERVICE

I, B. Hayden Crawford, hereby certify that I delivered a true and correct copy of the foregoing Second Renewal of

Motion for Judgment of Acquittal to: Hubert Bryant, Esq., United States Attorney for the Northern District of Oklahoma, and Eleanor Thompson, Assistant United States Attorney, Page Belcher Federal Building, 333 West Fourth Street, Tulsa, Oklahoma 74103. February 15, 1979.

B. HAYDEN CRAWFORD

EXHIBIT "A"

The Tulsa Tribune

VOL. 85 - No. 38
TULSA, OKLAHOMA
WEDNESDAY, FEBURARY 14, 1979

Juror rips Barrow's verdict dismissal

By DON HAYDEN

A jury foreman, angered by D.S. District Judge Allen E. Barrow's dismissal of a guilty verdict in a recent bank fraud case against financier Bill M. Martin, says his "faith in the judicial system is shaken."

"I have never seen a more biased proceeding," declared Arthur Berkey, a retired labor relations board arbitrator.

Berkey, who lives in Locust Grove, labeled Martin's trial a "severe waste of time, money, and energy."

And, he says, he has contacted other jurors and they also are angry.

HE SAID HE and other jurors also complained of remarks by Barrow during the trial which began in December and concluded in February.

Attempts by The Tribune to contact Barrow at his home and office were unsuccessful.

Martin was accused in a 12-count indictment alleging he misapplied bank funds and provided false information for friends to enable them to obtain loans.

By the time the case went to the jury, the judge had whittled 10 of the counts from the case.

After about three hours deliberation, the jury

unanimously declared Martin guilty on the two remaining counts.

BERKEY SAID he thought that was the end of the case until he learned the following morning that Judge Barrow had dismissed one of the final two counts and may still dismiss the other.

After the jury was released, oral arguments were heard by U.S. Attorney Hubert Bryant and defense attorney B. Hayden Crawford.

Of the verdict, Bryant said "...the jury heard the evidence...the jury has spoken."

BARROW DECLARED that "the court is not stuck with this decision."

Additionally, the judge said the final count might be dropped after study of the trial transcript. That decision is pending.

Berkey said the judge's statement was a "slap in the face" of jurors and said he felt if there was any doubt in the judge's mind, the count should have been dismissed before it went to the jury.

Berkey said he and his fellow jurors "worked long and hard to reach a verdict" and questioned the judge's right to acquit Martin following the guilty verdict.

"When we came back from our deliberations, the judge complimented us for our our attentiveness during the case...we thought we had done a good job.

"It is extremely difficult for us to understand what happened," he said.

"And in discussing Martin's case in the jury room with all the documents, we went beyond a reasonable doubt in reaching our decision...we held he was guilty beyond a shadow of a doubt," Berkey said.

AT THE OUTSET of the trial, Berkey said, the judge told the jurors it was a great privilege to serve on a federal trial jury.

"He reminded us the great privilege of Americans being able to have trials by jury, noting that America was one of the few countries today where such legal means are

preserved.

"By the time the trial was over, my faith was shaken.

"Now, I ask, 'how secure is the right of trial by jury...if the judge can take a verdict away from a jury?'"

Berkey, who for 25 years represented an international union, said he knows something of the law.

"I've had to try cases in the union, hear cases as a judge and hold hearing on union employees. In labor circles, I am what is considered a trial lawyer," he said.

In 1972, Berkey acted as arbitrator for the Tulsa Fraternal Order of Police in negotiations with the City of Tulsa.

"A lot of country judges used to look at labor as the Loch Ness Monster and they'd give all sorts of weight to the other side.

"And yet, when I look back on them, they always gave a much more unbiased proceeding than Judge Barrow did," he said.

BERKEY SAID he and other jurors objected to remarks by Barrow during the trial that "greed raised its ugly head," referring to witnesses who used Martin as a financial advisor.

Barrow, noting an abundance of psychiatric testimony about Martin's mental condition, said he wondered how many of Martin's associates were "taking advantage of a sick man."

"We didn't base our verdict on whether some of those associates got off scot free...we based it solely on Martin, testimony about him and exhibits," Berkey said.

"Whether or not greed raised its ugly head has nothing to do with the guilt or innocence of Martin, in my opinion," he said.

SEVERAL OF THE COUNTS dismissed by Barrow dealt with deposits by Martin's former father-in-law into the Jenks Bank of Commerce where Martin was chairman of the board of directors.

Lynn Fryer, the father-in-law, testified Martin asked him to deposit large sums of money in the bank for a

higher rate of interest. He said he ultimately deposited more than $100,000.

When the financial empire crumbled, Fryer went to the bank where he said he learned he had no savings account and deposits were in Martin's checking account.

One count dismissed by Barrow dealt with an $80,000 deposit by Fryer for sale of 22 acres by by him to Martin.

THE JUDGE REPEATEDLY made reference to the sale, calling the price "outrageous" and noting he owned land in the area.

Berkey said he felt it was immaterial what the land sold for, noting it was a case of "buyer beware."

He said during deliberations he polled the jury several times to "make positive we were all in agreement about the verdict."

Berkey said he had never before served on a federal court jury and "had wanted to all my life."

"I don't believe I want to serve in that courtroom again...my animosity might cause me to be prejudiced.

"I have serious doubts whether I could reach an honest decision in that court.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	
BILL M. MARTIN,	)	No. 78-CR-119-B
Defendant-Appellant.	)	

THIRD RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL

COMES NOW the defendant, Bill M. Martin, through his attorneys, and enters herein his Third Renewal of Motion for Judgment of Acquittal on Count II of the Indictment and, in support thereof, respectfully states:

I.

The defendant incorporates herein the statements and arguments made in support of his Motion for Judgment of Acquittal on Count II which was entered herein at the close of the Government's evidence and at the close of all of the evidence, and his first renewal of the Motion for Judgment of Acquittal immediately after the return by the jury of the verdict of guilty to Count II, and his Second Renewal of Motion for Judgment of Acquittal entered herein on February 15, 1979.

II.

On February 15, 1979 there appeared at the top of the front page of Section D in the Tulsa, Oklahoma afternoon newspaper, an article headlined "Juror Stands Firm" in which the jury foreman, Arthur Berkey, is quoted with

regard to alleged evidence pertaining to the psychiatric defense of the defendant, Bill M. Martin, which newspaper article is attached hereto as Exhibit "B."

It is now clearly apparent by the continued attack by this juror upon the Court and the proceedings, through his statements to the news media, that this juror is endeavoring to improperly influence the Court with regard to the decision the Court has under advisement pertaining to the defendant's Motion for Judgment of Acquittal on Count II of the Indictment.

The actions of this juror in his public statements pertaining to a matter under advisement by the Court is highly prejudicial to the defendant and contrary to the concepts of fairness inherent in our judicial system.

The battery of public accusations by this juror against the defendant, Bill M. Martin, is contrary to the constitutional guarantees to a defendant to be confronted by the witnesses against him.

III.

Arthur Berkey is quoted in the newspaper article of February 15, 1979 as having stated to the newspaper reporter that *"The judge didn't explain whose responsibility it had been to determine if Martin was sane or insane . . ."*

It is now clearly apparent, if that statement be true, that the juror did not understand the Court's instructions and, consequently, could not have properly applied the facts to the law.

The Court instructed the jury that the "Government must establish the sanity of the defendant at the time of the commission of the alleged offenses beyond a reasonable doubt . . . "

The Court further instructed the jury that "defendant is not guilty if, at the time of the alleged criminal acts as a result of a mental disease or defect, he lacked substantial capacity to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

IV.

Arthur Berkey is further quoted in the newspaper article of February 15, 1979, as stating that two of the Government's psychiatrists testified that they examined Martin five days prior to his trial . . . *and that a staff composed of 25 members unanimously said he was sane at the time mentioned in the Indictment.*

It is apparent, if those statements be true, that the juror based his decision upon "factual conclusions" that were not correct or even a part of the evidence.

There was testimony by a Government psychiatrist and a Government psychologist that they examined Martin for approximately 30 minutes, and there *was no testimony that the defendant was examined by a "staff composed of 25 members."*

V.

The newspaper article stated that "A letter was introduced from a Fort Smith, Ark., psychiatrist that dealt with part of the period" and then quoted Arthur Berkey as having stated to the newspaper reporter that "that letter was so broad it could have been taken to mean anything . . . "

The letter from the Fort Smith, Ark. psychiatrist, Dr. Max Alden Baker, was introduced into evidence as defendant's Exhibit 10 and a copy thereof is attached hereto.

The letter consists of four paragraphs on one

page. In the second paragraph Dr. Baker states that he "initially saw Mr. Martin for one visit several months ago when he and his wife were referred to me for a discussion of some problems with their children." In the third paragraph of the letter Dr. Baker states that the next contact with the patient was on October 23, 1978 when he was presented at St. Edward Hospital emergency room on referral from Dr. Don Meador. Dr. Baker examined the defendant at that time and stated that he felt that the patient had "manic depressive illness, circular type," which is the identical analysis and conclusion made by Dr. Mary Hamilton in her analysis of the defendant approximately 16 years earlier when she also admitted the defendant to a hospital for psychiatric treatment.

VI.

Dr. Max Alden Baker was scheduled to testify for the defense on Friday, February 2, 1979. At 3 o'clock in the morning of that date, Dr. Baker was admitted to a hospital in Fort Smith for emergency treatment resulting from severe abdominal pains and, consequently, was unable to testify as scheduled. In view of the public statements of the juror pertaining to the letter from Dr. Max Alden Baker which was introduced into evidence as Defendant's Exhibit 10 in lieu of the testimony of Dr. Baker, the defendant now, through his attorneys, offers the anticipated testimony of Dr. Baker had he been able to testify in this cause as scheduled, which offer is made in response to the public statement of the juror pertaining to Defendant's Exhibit 10.

Dr. Baker would testify that when he first saw Mr. Martin several months ago about some problems with the children, that Mr. Martin told Dr. Baker that he was worth several million dollars, that he owned millions of dollars of land in

Arkansas, that he was under constant threats of kidnapping, that it was necessary for him to be heavily guarded by bodyguards, and that he lived as Howard Hughes did — "pushing buttons in a penthouse." Dr. Baker would have testified that on that occasion he "fell for it, hook, line and sinker."

Dr. Baker would have further testified that when he admitted the defendant to St. Edward Hospital on October 23, 1978, that he thereafter ordered various psychological tests to be conducted on Bill M. Martin and that they established that the defendant was a "classic case of a manic depressive."

Dr. Baker would have further testified that as a result of the defendant's mental illness "he lacked the substantial capacity to understand the wrongfulness or illegality of his acts."

Dr. Baker would further have testified that he was satisfied that the defendant "was not capable of either knowing what he was doing or was incapable of controlling his conduct due to the serious nature of his mental illness."

Dr. Baker would not have testified that he had an opinion with regard to the defendant's state of mind at the time of the acts alleged in the Indictment because he did not have the opportunity to examine the defendant at or near those times.

WHEREFORE, in the interest of justice and in response to the public statements of the juror, Arthur Berkey, pertaining to the mental state of the defendant, it is respectfully requested that the Court, in addition to reviewing the testimony of this proceeding, permit Dr. Baker to appear and clarify, if necessary, "a letter that was so broad it could have been taken to mean anything."

Respectfully submitted,

MORRELL, HERROLD, WEST, HODGSON, & STRIPLIN, P.A.

and

CRAWFORD & JACKSON

By B. HAYDEN CRAWFORD
1714 First National Building
Tulsa, Oklahoma 74103

Attorneys for Defendant

CERTIFICATE OF SERVICE

I, B. Hayden Crawford, hereby certify that I delivered a true and correct copy of the foregoing Third Renewal of Motion for Judgment of Acquittal to: Hubert Bryant, Esq., United States Attorney for the Northern District of Oklahoma, and Eleanor Thompson, Assistant United States Attorney, Page Belcher Federal Building, 333 West Fourth Street, Tulsa, Oklahoma 74103, February 16, 1979.

B. HAYDEN CRAWFORD

EXHIBIT "B"

Juror stands firm

Barrow plans hearing on complaints

By DON HAYDEN

A federal court juror who aired his opinion Wednesday over U.S. District Judge Allen E. Barrow's dismissal of a guilty verdict declared today he won't be intimidated by the judge if he is hauled into court to defend his views.

Arthur Berkey of Locust Grove, who served as jury foreman during the lengthy trial of Tulsa financier Bill M. Martin, accused of bank fraud, said earlier his "faith in the judicial system was shaken."

Barrow said he would hold a show cause hearing to see if Berkey quoted him "on statments made outside the hearing of the jury."

"HE VIOLATED his oath if he read the newspaper accounts of the trial in progress...," Barrow said.

Martin was accused in a 12-count indictment alleging he misapplied bank funds and provided false information for friends to enable them to obtain loans.

By the time the case went to the jury, Barrow had dismissed 10 of the 12 counts. After three hours deliberation, the jury found Martin guilty.

AFTER THE JURY was excused, Barrow dismissed one of the remaining counts and indicated the other might be dropped after further examination of the trial transcript.

Berkey said his wife clipped news articles during the Martin trial, but that he didn't read any of them until the trial was over.

A judge's admonition that jurors refrain from reading or listening to news accounts of a trial ceases when the trial is completed.

BERKEY, A NATIONAL Labor Relations Board arbitrator for 25 years, said in legal circles he was what is considered a trial lawyer.

However, the foreman said he wasn't an attorney in the strict sense of the word, since he never took a bar examination.

"But I had to hold hearings and sometimes act as a judge," he said.

BARROW APPARENTLY took exception to Berkey's remarks prior to a drug trial Wednesday and said "if this man is a lawyer, he withheld this...he is going to have a chance to explain."

Berkey said he believes he has the right to his own opinion, saying, "That is the American way."

"I talked this over with my wife and I stand behind what I said.

"I can't and won't be intimidated by that judge."

No date has been set for the show cause hearing.

PRIOR TO THE jury's deliberations, Barrow instructed jurors to determine if Martin was sane at the time of his financial dealings and then decide the two remaining fraud counts.

'The judge didn't explain whose responsibility it had been to determine if Martin was sane or insane, however," Berkey said, noting both the prosecution and defense touched on the issue.

"After some deliberation, we unanimously agreed the man was sane at the time he committed the acts in the two counts.

"WE THEN WORKED long and hard to reach a verdict on the two counts and I polled the rest of the jury three times to make absolutely sure we all were in agreement," he said.

Two government psychiatrists testified they examined Martin five days prior to his trial and found he was responsible for his acts during the period noted in his indictment.

A STRING OF private psychiatrists testified for the defense that Martin was a manic-depressive prior to and following the period in question.

A letter was introduced from a Fort Smith, Ark., psychiatrist that dealt with part of the period.

"But that letter was so broad it could have been taken to mean anything...we put more credence in the government's psychiatrists," Berkey said.

THE GOVERNMENT witnesses said Martin underwent a battery of tests during his examination and that a staff composed of 25 members unanimously said he was sane at the time mentioned in the indictment.

Exhibit 10

BAKER PSYCHIATRIC CLINIC
Professional Association

MAX ALDEN BAKER, M.D. MARGARET O. STEVENS, A.C.S.W.

November 22, 1978

Mr. Robert Bainbridge
Attorney at Law
1714 First National Bank
Tulsa, Okla. 74103

Re.: William M. Martin

Dear Mr. Bainbridge:

I am sorry on the delay in responding to your phone request for information concerning your client, Mr. William Martin. I had mailed him a release of information and had awaited its return.

I initially saw Mr. Martin for one visit several months ago when he and his wife were referred to me for a discussion of some problems with their children. At that time I did not detect evidence of overt psychiatric illness in the patient; however, the context of that interview was almost entirely in discussing the family problem.

My next contact with the patient was on 10/23/78 when he presented at St. Edward Hospital emergency room on referral from Dr. Don Meador. The patient appeared quite different than he had earlier and was obviously depressed and distressed. He gave a history of cyclical mood disorder with two periods requiring past psychiatric treatment. In addition, in the interim, he described periods of bi-polar mood swings with alternating periods of depression, normal mood, and transiently elated mood. I felt that the patient had manic depressive illness, circular type, and that at the time of the emergency room visit was clearly depressed. The patient was admitted to

the hospital and was placed on Traivil, a combination of a tricyclic antidepressant and a major tranquilizer. He was discharged on 10/31/78 improved. When seen in my office on followup on 11/21/78, he had continued to exhibit mood swings of a bi-polar nature. Bcause of this the patient was placed on Lithium Carbonate, a mood normalizer. His condition when last seen was improved from the time of admission, however, he was still clearly symptomatic. My plans will be to continue him on an outpatient program. Approximately 90% of patients with bi-polar affective disorder experience a dramatic normalization of mood on Lithium Carbonate.

I hope this information is helpful to you.

Sincerely,

Max Alden Baker, M.D.

MAB/tw

Appendix G

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 79-2000

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

BILL M. MARTIN

Defendant-Appellant

APPEAL OF GUILTY VERDICT OF COUNT II OF AN INDICTMENT IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPELLANT'S PETITION FOR RE EARING AND SUGGESTION FOR REHEARING IN BANC

B. HAYDEN CRAWFORD
Crawford, Crowe & Bainbridge
1714 First National Bank Bldg.
Tulsa, Oklahoma, 74103

and

RICHARD A. HOFFMAN
Morrel, Herrold, West, Hodgson, Shelton & Striplin, P.A.
4111 South Darlington, Suite 600
Tulsa, Oklahoma, 74135

ATTORNEYS FOR DEFENDANT-APPELLANT

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IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	
BILL M. MARTIN,	)	No. 79-2000
Defendant-Appellant.	)	

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Introductory Statement

On January 8, 1981, this Court filed its per curiam opinion affirming the order of the District Court overruling the appellant's motions for new trial and for judgment notwithstanding the verdict with regard to Count II of the indictment. Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, the appellant requests that a rehearing be granted and respectfully suggests that such rehearing be in banc because this proceeding involves the following questions of exceptional importance:

(1) Whether or not the rights of the appellant were clearly and substantially prejudiced by the trial court in permitting cumulative evidence in a twelve-count indictment to be considered by the jury when ten of the counts were dismissed at the closing of substantive evidence without explaining to the jury the reasons for sustaining the defense motions for directed verdicts of acquittal.

(2) Whether or not the rights of the appellant were clearly and substantially prejudiced by the order of the trial court not allowing counsel to question the jury foreman to determine the validity of statements he was making to the news media concerning the prejudicial attitude of the jury toward the Court and the appellant resulting from the Court's dismissal of ten counts of the indictment.

(3) Whether or not the rights of the appellant were clearly and substantially prejudiced by the inability of the jury to fairly and impartially exclude the evidence pertaining to the ten counts dismissed in considering the two remaining counts.

Statement of the Case

On October 5, 1978, the appellant was charged in a twelve-count indictment by a grand jury convened by the United States District Court for the Northern District of Oklahoma. The appellant entered a plea of not guilty to each of the twelve counts on October 12, 1978.

Due to drafting errors by the Government in the first indictment, the appellant was reindicted on November 8, 1978. On November 28, 1978, the appellant entered pleas of not guilty to each of the twelve counts of the second indictment and at that time the first indictment was dismissed.

On December 8, 1978, the appellant, having been fully informed of his constitutional rights, waived his right to trial by jury and consented that his cause could be heard by the court. The Government refused to waive jury trial and on January 9, 1979, the jury was selected and sworn.

At the close of the Government's case in chief, the Court, after having heard the arguments of counsel outside the presence of the jury, entered orders of acquittal on Counts I, III, IV, V, VIII, IX, X and XII. At

the close of the appellant's evidence, the Court sustained the appellant's renewed motion for acquittal as to Counts VI and XI.

On February 6, 1979, the jury returned a verdict of guilty on Counts II and VII of the indictment and on February 6, 1979, the appellant reargued his motions for acquittal with regard to Counts II and VII. The Court entered a Judgment of Acquittal Notwithstanding the Verdict on Count VII of the indictment and took the appellant's motion under advisement as to Count II.

On February 26, 1979, the trial court suffered a relapse of an illness from which he suffered during the trial, and died prior to ruling on the appellant's remaining Motion for Judgment of Acquittal. The case was reassigned to another District Judge and on August 1, 1979, the succeeding District Judge entered an order overruling the appellant's Motion for Judgment of Acquittal on Count II of the indictment.

On August 31, 1979, the appellant's motion for new trial on Count II was overruled and the succeeding trial court granted appellant's Motion to Extend Time to File Appeal.

Subsequently, the appellant was sentenced to a term of fourteen months in the custody of the Attorney General and was fined $2,000.00 on Count II of the indictment. Execution of the sentence was stayed pending the appeal in this Honorable Court.

Summary of Factors Warranting Rehearing

I. The Decision in This Case Seriously Misconceives the Impact Upon the Jury of the Evidence Under the Ten Counts That Were Dismissed and the Jury's Lack of Understanding of the Reasons For Such Dismissals

The decision states that the defendant urges that he was denied a fair trial by reason of the evidence which

was presented on the counts which were dismissed. The Court further states that:

> "No relief on this ground was sought in the trial court and no challenge was made to the joinder under Rule 14 of the Federal Rules of Criminal Procedure.
>
> "It was obvious that proof would be offered on each count.
>
> "If defendant was concerned about the overall impact of the proof, a remedy was available to him under the rules."

There is no question but that it was obvious that proof would be offered on each count and, as the Court has indicated, it could not be anticipated prior to the trial that the ten counts would be dismissed. Under the circumstances existing prior to the trial, a motion to sever and a challenge to the joinder under Rule 14 of the Federal Rules of Criminal Procedure would not have been granted in accordance with the applicable law. *United States* v. *Mandel,* 415 F. Supp. 1033 (D. MD. 1976). Therefore, the fact that no relief was sought prior to the trial by reason of the evidence which was presented on the counts which were dismissed cannot properly be considered as a waiver of any right of the defendant.

It is not contended by the defendant that it was unfair for the Government to introduce evidence on all counts of the indictment as the trial proceeded. It is, however, urgently contended that the evidence presented to the jury on the ten counts which were dismissed was highly prejudicial to the defendant in the jury's deliberation on the two counts submitted to the jury.

Prior to the introduction of all of the Government's evidence, it was not possible for the defendant to determine whether or not the Government had sufficient evidence to prove the allegations set out in the indictment. On its face, the indictment set out twelve

events of similar nature. The evidence produced by the Government prior to trial was consistent with the type of documentation that would supplement testimony concerning the subject matter in the indictments. Therefore, the only way that the defendant could know whether or not the Government would meet its burden was to examine the evidence as it was presented.

To insure that the defendant be rendered a fair and impartial jury trial, the Court must consider this circumstance (where the Government was presented an indictment of multiple counts and the evidence will not support a conviction in the overwhelming majority of counts) in the same light as it would treat "multiplicity", that is charging a single offense in multiple counts. In such instances, the Government must complete its evidence before any objection can be made to an attempt to extract more than one punishment from one act or series of acts. *United States* v. *Gentile*, 60 F.R.D. 680 (D. N.Y. 1973).

Furthermore, it is apparent from the statements of the jury foreman to the news media that the jury was angered by the fact that the trial judge dismissed the ten counts of the indictment. On reflection, the jurors' anger and prejudice toward the judge is understandable. The arguments in support of the motions to dismiss the ten counts were made outside the presence of the jury and then there was only an announcement to the jury by the Court that the ten counts were dismissed without an explanation to the jury as to why the ten counts were dismissed, or any substantial explanation of what evidence was no longer to be considered, as not beng relevant to the counts remaining. This obviously created such a prejudicial attitude on the part of the jurors that they could not fairly and impartially consider only the evidence relating to the two remaining counts.

It is respectfully submitted that because of the overwhelming likelihood of such prejudice, under these

circumstances, that the only remedy now is either dismissal of Count II or an order for a new trial without the evidence of the dismissed counts under the indictment being submitted to the jury. *United States* v. *Parr*, 509 F.2d 1381 (5th Cir. 1975).

> Failure of the District Court to Permit Counsel to Question the Jury Foreman to Determine If His Statements As Reported by the News Media Were True Was a Clear Abuse of Discretion, Under the Circumstances, and Prevented the Defendant and the Court From Determining Whether or Not the Defendant Did, in Fact, Have a Fair Trial

It is clearly indicated from the purported remarks of the jury foreman after the trial, as reported by the newspaper, that the jury was angry with the trial judge for dismissing the ten counts during the trial. The jury foreman was quoted as follows:

> "I have never seen a more biased proceeding.
>
> "A lot of country judges used to look at labor as the Loch Ness Monster and they'd give all sorts of weight to the other side. And yet, when I look back on them, they always gave a much more unbiased proceeding than Judge Barrow did."
>
> "I don't believe I want to serve in that courtroom again . . . my animosity might cause me to be prejudiced."
>
> "I have serious doubts whether I could reach an honest decision in that court."

The newspaper further reported that the jury foreman said he had contacted other jurors and "they also are angry," that he and other jurors also complained of remarks by Judge Barrow during the trial and that it was "extremely difficult for us to understand what happened."

It is crucial to the determination of whether or not this defendant received a fair and impartial trial to know whether or not the anger of the jury foreman, and the confusion and difficult of understanding he attributes to himself as well as the other jurors, existed prior to the deliberation of the jury. If his animosity could cause him to be prejudiced in the future, could it not have caused him to be prejudiced in fact in this proceeding?

To submit to the jury two counts of the indictment in an atmosphere of anger of the jurors toward the trial judge is obviously highly prejudicial and unfair to the defendant in that the jurors could not render a fair and impartial verdict, free and clear of animosities, anger or resentment. When the statements of the jury foreman were published in the newspapers, copies of which are part of the record in this case, the defendant immediately filed his Second Renewal of Motion for Judgment of Acquittal and therefore his right to object was not waived!

While Rule 33 of the Rules of the District Court for the Northern District of Oklahoma requires court approval before approaching a jury after completion of a case, Disciplinary Rule 7-108 of the Canons of Professional Responsibility does not prohibit the contacting of a jury except to avoid harassment or embarrassment. When there is a legitimate question as to the conduct of a juror or jury, as in this case, the interests of justice require that a defendant be *guaranteed* a fair trial. The prohibition against questioning of members of a jury must give way to the truth finding process to insure that justice is accomplished. *Butler* v. *United States* 317 F.2d 249 (8th Cir. 1963), cert den. as *Benedec* v. *United States*, 375 U.S. 836 and 375 U.S. 838.

III. The Decision in This Case Fails to Recognize That There Was Reason Advanced Why the Jury Could Not Relate the Proof to the Counts

and That The Remarks of the Prosecutor in Argument Were Not in Reference to Minor Points But Rather to the Totality of the Evidence on All Twelve Counts

This decision states that "there is no reason advanced why the jury could not relate the proof to the counts." It is respectfully submitted that the jury's inability, under these circumstances, to relate the proof to the counts is clearly demonstrated by the jury finding the defendant guilty of Count VII when there was no evidence to support that count, as found by the trial court in its dismissal of Count VII after the jury returned its verdict!

Furthermore, this decision states that:

> "The prosecutor in the argument did refer to some of the events which had been described in the proof on counts which had been dismissed. These references were of minor points and there is no reason to believe that they were not inadvertent."

It is respectfully submitted that the issue is not whether the remarks were inadvertent, but rather whether or not they were detrimental to the defendant, resulting in clear error and an unfair trial. The references by the prosecutor to the jury constituting such clear error were not of minor points, but referred to the evidence under the entire twelve-count indictment, as follows:

> "... relating to you facts ... so that you would get a total picture as to what took place over the two-year period that this indictment covers ... " (TR 887)
>
> "When financial empire crumbles ... had a ball club, owned the Tulsalite Magazine, controlling interest in three banks." (TR 889)
>
> "How much did he actually get from *all* of these investors" (emphasis added) (TR 931)

Furthermore, the constant references to investors (in the plural), clients (in the plural) and bankers (in the plural) were references to all twelve counts and to many of the 45 exhibits introduced by the Government in support of the ten dismissed counts. Only four other exhibits related to the two counts that went to the jury. The reference to the "maze of documents . . . " (TR 890) clearly refers to the totality of the evidence and was clearly prejudicial to the defendant's right to be tried on only the evidence pertaining to two counts that went to the jury. In addition, the prosecutor's continued comments to evidence totally unrelated to Counts II and VII, inadvertently or not, encompassed the totality of the evidence, such as:

> "... he became involved with three banks and had plans to buy more." (TR 928)
>
> "... assigning over all his assets except his house and his car? ... why did he sign it? ... he admitted that he had done wrong." (TR 928)
>
> "I have yet to hear one witness say Mr. Martin did not commit these criminal acts as charged in this case (all twelve counts)" (TR 928)
>
> "He (Martin) said he was worth 3 to 14,000,000, according to his financial statement, what he told him. That is what he told his own lawyer." (TR 933)

It is obvious that the prosecutor could not separate the evidence pertaining to the ten dismissed counts from the evidence pertaining to the only two counts that the jury was to consider, and therefore how could the Court expect the jury to do so?

These constant reminders of the dismissed counts could only have served to add to the confusion and anger referred to by the jury foreman. The counts left to the jury involved only one investor and the prosecutor admitted in

his closing argument that only one financial statement existed in support of those two counts. Despite the failure of the Government to present the financial statement required by Count VII, the jury rendered a verdict of guilty on Count VII. One can only be left with the conclusion that their anger and confusion controlled their decision, and that the deliberation was not fair and impartial.

This use of the evidence from dismissed counts could not help but present a picture to the jury of a criminal propensity of the accused. This is clearly shown by the conviction in Count VII, where evidence was so obviously missing, and is precisely the type of "spillover effect" that must be protected against. **United States** v. **Foutz,** 540 F.2d 733 (4th Cir. 1976) and *Drew* v. *United States,* 18 U. S. App. D.C. 11, 331 F.2d 85 (1964). Furthermore, the unusual nature of this case and the Government failing to met its burden of proof in eleven of the twelve counts of the indictment setting out "similar" criminal activities when coupled with an obvious "spillover effect" must be considered sufficiently prejudicial for consideration as in *Gentile,* supra.

Conclusion

It is respectfully submitted that it is apparent from the foregoing that the totality of the errors resulted in clear error which either were not or could not be waived by the defendant and that the only remedy now is to either remand Count II for retrial or to dismiss Count II in the interest of justice.

Respectfully submitted,

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and

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Tulsa, Oklahoma 74135

Attorneys for Defendant-
Appellant

Certificate of Service

I, B. Hayden Crawford, do hereby certify that on the 23rd day of January 1981, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Petition for Rehearing and Suggestion for Rehearing In Banc to:

Hubert Bryant, Esq.
Robert Santee, Esq.
United States Attorneys' Office
Page Belcher Federal Bldg.
Tulsa, Oklahoma 74105

B. HAYDEN CRAWFORD

Appendix H

Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick
A Professional Corporation
Attorneys and Counselors at Law
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Oklahoma City, Oklahoma 73102
(405) 232-0661

April 6, 1979

The Honorable Luther L. Bohanon
United States District Court
Western District of Oklahoma
Federal Courthouse Building
Oklahoma City, Oklahoma 73102

Re: Daiflon, Inc. v. Allied Chemical Corporation, et al., United States District Court for the Western District of Oklahoma, 72-C-483

Dear Judge Bohanon:

Pursuant to the provisions of Rule 29 (B) 5 of the Rules of the United States District Court for the Western District of Oklahoma, defendants request permission to visit with one or more of the jurors who have recently completed their service in the above captioned case.

I represent to your Honor that the purpose of this visitation is not to harass or embarrass any juror or to influence that juror's actions in any future jury service but, rather, to attempt to glean any general reaction that the juror may have had to this case and to discern which trial tactics or maneuvers were particularly impressive to the juror and which were particularly unimpressive.

As an officer of your Court, I represent to you that our contact will in no way be improper or deleterious to the administration of justice within this district.

Very truly yours,

D. KENT MEYERS
For the Firm

DKM/sh

cc: Plaintiff's Counsel
Defense Counsel

Appendix I

United States District Court
Western, Northern and Eastern District of Oklahoma
Federal Building
Oklahoma City, Oklahoma 73101
April 10, 1979

D. Kent Meyers, Esq.
Crowe, Dunlevy, Thweatt, Swinford,
Johnson & Burdick
17th Floor, Liberty Tower
Oklahoma City, OK 73102

Re: Daiflon, Inc. v. Allied
Chemical Corporation, et al.
No. CIV-72-483

Dear Mr. Meyers:

The court is in receipt of your letter of April 6 requesting permission to interview or visit with one or more of the jurors sitting in the trial of the above-captioned case.

Your request is granted.

Yours truly,

LUTHER BOHANON

cc: All Counsel of Record
Court Clerk